DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Commission Consideration	)	IB Docket No. 00-106
of Applications under the	)	
Cable Landing License Act	)	
	)	

COMMENTS OF
FLAG TELECOM HOLDINGS LIMITED

Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7288
(202) 371-7096

August 21, 2000

TABLE OF CONTENTS

SUMMARY

FLAG Telecom Holdings Limited ("FLAG Telecom") wholeheartedly supports the Commission's proposals to expedite cable landing license application processing. The explosive growth of the Internet has led to a skyrocketing demand for transmission capacity and, accordingly, infrastructure deployment (in particular, submarine cables). Streamlined processing will facilitate more rapid infrastructure build-out and thus speed competitive entry to the market. Adoption of complicated criteria for qualifying for streamlined processing, however, could unintentionally stymie, rather than streamline, submarine cable landing license application processing.

The Commission therefore should adopt qualifying criteria that would promote liberal streamlined processing for most cable landing license applications. In particular, the Commission should identify periodically, on its own motion, routes that are presumed competitive. Moreover, in determining whether a route is competitive, the Commission should consider all transmission capacity – including all cables regardless of age and satellite capacity – to a given region.

Finally, private carrier status affords cable landing licensees the much needed flexibility to respond to rapid technological changes in the marketplace. The Commission therefore should maintain the private/common carrier distinction, but should cautiously impose common carrier obligations only in those exceptional circumstances where the proposed cable ownership raises real anti-competitive concerns on a U.S./foreign route.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Commission Consideration	)	IB Docket No. 00-106
of Applications under the	)	
Cable Landing License Act	)	
	)	

COMMENTS OF
FLAG TELECOM HOLDINGS LIMITED

FLAG Telecom Holdings Limited ("FLAG Telecom") submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding ("*Submarine Cable Streamlining NPRM*"). FLAG Telecom wholeheartedly supports the Commission's proposed objectives of expediting cable landing license application processing where appropriate, discouraging anti-competitive behavior, and encouraging pro-competitive licensing procedures in foreign countries.

FLAG Telecom has extensive experience in operating undersea cables and facilities and participation in filing cable landing license applications in the United States and abroad. Specifically, FLAG Telecom, through a subsidiary, owns and operates the FLAG Europe Asia undersea fiber optic cable system serving Europe, India, the Middle East, and Asia.[1] FLAG Telecom is currently constructing, through a 50/50 joint venture with GTS

---

[1] This system has landing points in the United Kingdom, Spain, Italy, Egypt, Jordan, the (continued...)

TransAtlantic Holdings, the FLAG Atlantic-1 cable system, the first tera-bit submarine cable extending between the United States and the United Kingdom and France scheduled to begin commercial service in the first quarter of 2001.[2] In addition, FLAG Telecom, through a wholly owned subsidiary, has filed an application to land and operate in the United States a private fiber optic submarine cable network – FLAG Pacific-1 – extending tera-bit capacity across the Pacific Ocean from the United States to Canada, Korea, and Japan.[3]

In light of its experience in the licensing process in the United States and abroad, FLAG Telecom welcomes the Commission's efforts to streamline the regulatory approval process, and thus establish the United States as a pro-competitive and deregulatory model for other regulatory agencies throughout the world. Indeed, by making its processes simpler, quicker, and more transparent, the Commission can lead by example and facilitate the development of telecommunications infrastructure worldwide. FLAG Telecom nevertheless cautions the Commission to refrain from adopting extensive regulatory "options" that unintendedly could stymie, rather than streamline submarine cable application processing, and discourage the construction of new cables on previously under-served routes. As discussed in

---

1 (...continued)
Kingdom of Saudi Arabia, United Arab Emirates, India, Malaysia, Thailand, China, South Korea, and Japan.

2 *See FLAG Atlantic Limited*, Cable Landing License, File No. SCL-LIC-19990301-00005 (rel. Oct. 1, 1999).

3 *See* Public Notice, FLAG Pacific Limited Submarine Cable Landing License Application, SCL-LIC-20000606-00023, Rep. No. TEL-00247NS (June 16, 2000).

greater detail below, the Commission can achieve even more meaningful and straightforward streamlining and accomplish its overall pro-competitive objective by:

- refining and simplifying the proposed options for streamlined grant of cable landing licenses;
- preserving the status of submarine cables as private carriers, except in exceptional circumstances, to maintain much needed flexibility in this capital intensive industry; and
- clarifying, streamlining, and codifying conditions routinely imposed on submarine cable landing licenses.

I. THE PROPOSED STREAMLINING OPTIONS SHOULD BE FURTHER REFINED TO MAKE THE APPLICATION PROCESSING PROCEDURES MORE SIMPLE AND STRAIGHTFORWARD.

FLAG Telecom generally supports each of the proposed methods for applicants to qualify presumptively for grant of a cable landing license on a streamlined basis. FLAG Telecom further agrees with the Commission's proposal that the streamlining options should apply equally to initial license applications and to applications to assign or transfer existing cable landing licenses.[4]

To expedite processing for applications involving routes with some, but not all, segments eligible for streamlining, FLAG Telecom advocates that the Commission apply its streamlined procedures with respect to the eligible segments. In-depth consideration would then apply only to those segments that do not qualify for streamlined processing. A phased streamlined grant would allow construction to begin earlier on those segments that qualify for streamlined processing. Such flexibility for carriers in the application process would increase

---

4 *See Submarine Cable Streamlining NPRM*, para. 24.

the legal and regulatory certainty surrounding the cable project, and thus make access to financing easier and the proposed cable more appealing to potential customers. Increased regulatory certainty in turn would promote the more rapid build-out and deployment of infrastructure, thereby increasing and accelerating competition on the relevant route.

The Commission, however, will effectively streamline the application process only if the criteria for qualifying for streamlined grant are simple and easy to apply and thus easily accessible to new entrants. The evidentiary showing to qualify for streamlined processing should not be substantially more burdensome than the data showing required to be filed in an ordinary, non-streamlined cable landing license application. The criteria for streamlining should entail simple, straightforward showings using data that can be readily gathered by applicants. Moreover, as with streamlined section 214 applications,[5] streamlined processing should curtail petitions to deny or objections from competitors who seek to use the license process to impede entry.

A. Option 1 – Demonstration that a Route Is or Will Become Competitive.

1. *Obviously Competitive Routes Should Automatically Qualify for Streamlined Treatment.*

The Commission should classify a route as competitive through any of the following procedures: (1) an application for a cable landing license demonstrating that the proposed route is competitive; (2) a petition for declaratory ruling; or (3) Commission action, periodically, on its own motion.

---

[5] *See 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, Report and Order, 14 FCC Rcd 4909, para. 9 (1999).

While the Commission should entertain petitions for declaratory ruling regarding the competitiveness of a particular route,[6] the Commission should identify, on its own motion and periodically (e.g., semi-annually), routes that are presumed to be competitive and thus qualify for streamlined treatment. The Commission frequently takes such unilateral action when it identifies routes that qualify for relief from the international settlements policy and lists foreign telecommunications companies that are presumed to possess market power.[7] In addition, the International Bureau maintains an exclusion list that identifies restrictions on providing service to particular countries.[8] Moreover, once a route has been classified as competitive, absent extraordinary market changes on that route, it should not subsequently be deemed otherwise.

As Commissioner Ness notes, capacity on trans-Atlantic and trans-Pacific routes has grown exponentially in the last three years.[9] It makes no sense to continue

---

6 *See Submarine Cable Streamlining NPRM*, para 32.

7 *See, e.g., 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements*, Report and Order on Reconsideration, 14 FCC Rcd 7963 (1999) (Commission modifying international settlements policy to exclude arrangements for exchange of international traffic on routes where U.S. carriers are able to terminate at least 50% of U.S.-billed traffic at rates that are at least 25% below the benchmark settlement rate); Public Notice, "Commission Releases List of International Routes That Satisfy Criteria for Relief from the International Settlements Policy and Associated Filing Requirements," DA 99-1510 (rel. July 29, 1999).

8 *See Streamlining the International Section 214 Authorization Process and Tariff Filing Requirements*, 11 FCC Rcd 12884, 12892-93 (1996) (discussing maintenance of exclusion list and identification of restricted countries, such as Cuba).

9 *See Submarine Cable Streamlining NPRM*, separate statement of Commissioner Susan (continued...)

agonizing over whether these routes warrant the full-blown competitive analyses of a traditional cable landing license application. The Commission can and should rely on the obvious rather than wait for a declaratory ruling petition. FLAG Telecom also agrees that the Commission should declare certain regions competitive, such as the North-Atlantic route to the European Community and the trans-Pacific route to Asia.[10] In addition, rather than force parties (typically new entrants) to file petitions for declaratory ruling to prove that routes are competitive, the Commission should reverse the burden and presume that routes to countries that have liberalized their international transport markets are prima facie competitive and thus subject to streamlined treatment.

2. *Satellite Capacity Should Be Considered in Determining Whether a Route Is Competitive.*

FLAG Telecom disagrees with the Commission's proposal not to consider satellite capacity in determining whether a route is competitive.[11] In conducting its competitive analysis, the Commission should take into consideration the full transmission capacity in a given region, including alternatives to the direct submarine cable route such as hubbing and satellite capacity, as opposed to simply examining the availability of submarine cable capacity on a single destination route. Indeed, in determining whether to authorize a cable on a non-

---

9 (...continued)
Ness.

10 *See id.*, para 27 (proposing a regional route approach in determining whether sufficient competitive alternatives exist within a market).

11 *See id.* at n.57.

common carrier basis because sufficient alternatives exist on a particular route, the Commission previously has examined whether the route in question was served by other undersea cable *and* satellite circuits.[12]

Ironically, excluding satellite capacity when determining whether a route is competitive would have the effect of subjecting more cable landing license applications to non-streamlined processing and, accordingly, would delay the construction of competitive sources of capacity along a particular route. To achieve the full benefits of streamlined processing, the Commission therefore should consider all sources of international transport capacity – including satellite – along the route in question. At minimum, even if the Commission declines to consider each and every provider of satellite capacity along the route as separate competitive alternatives, the Commission should consider all satellite capacity available along that route as a single competitive alternative.

3. *A Route Can Still Be Competitive Even If the Cables Are Older Than 3 Years.*

FLAG Telecom disagrees with the Commission's proposed presumption that a cable is no longer competitive simply because it became operational more than 36 months ago.[13] Advances in technology and deployment of new electronics can give an old cable new life. Capacity on an existing cable can be expanded dramatically through upgrades. Existing capacity – regardless of whether deployed more than 36 months prior to the application in

---

12 *See SSI Atlantic Crossing*, 13 FCC Rcd 5961, n.12 (1997).

13 *See Submarine Cable Streamlining NPRM*, para. 28.

question – has an obvious impact on the prices, terms, and conditions of new capacity deployment. The mere age of the cable is thus not the relevant inquiry for determining whether a route is competitive. Rather, technological neutrality demands that the Commission focus on the amount of international transmission capacity (both satellite and submarine) available on the route in question. Accordingly, any cable that has capacity for sale or resale should be considered a competitor on a particular route, regardless of the age of the cable.

To the extent the Commission desires a bright line cut-off for determining competitive alternatives, FLAG Telecom submits that three years is arbitrarily short. FLAG Telecom's existing cable, which connects to 13 countries and three continents, was brought into service in November 1997 and remains competitive. Based on this experience, FLAG Telecom submits that well-maintained cables easily remain competitive for at least ten years after becoming operational.

Moreover, the proposed 36-month cut-off could discourage entry on "thin" routes (i.e., routes with little traffic and little growth) where existing cables serving those routes may be older than 36 months. To maintain their domination along these routes, the owners of older cables (which may employ competitively obsolete technology) would have increased incentive to oppose any non-streamlined applications by new entrants employing state-of-the-art technology. Such opposition would thus delay the introduction of new technology and maintain prices at artificially high levels on the route in question. Yet, under the proposed 36-month rule, the Commission would presume these older cables technologically obsolete, but nevertheless give full consideration to any competitive objections filed by

the owners of such older cables against non-streamlined applications to serve the same route.

B. Option 2 – Demonstration that the Proposed Cable Will Be Controlled Predominantly by New Entrants.

FLAG Telecom agrees that submarine cables that will be controlled predominantly by new entrants should be subject to streamlined licensing procedures.[14] While FLAG Telecom supports the Commission's proposal to evaluate whether a "key applicant" group controls less than 50 percent of the existing wet link capacity on the route in question, the definition of "key applicant group" should be refined to focus on control of the operations of the proposed submarine cable taken as a whole. That is, the "key applicant group" should include only an entity that is the exclusive backhaul provider in a particular market or that exercises *de facto* control over either the entire wet link of the proposed cable or *all* landing stations on either end of a particular segment of the proposed cable.

For the same reason that the Commission has proposed not to attribute control of a cable system to an entity controlling fewer than all of the landing stations in a particular country, the Commission likewise should not include in the "key applicant group" any entity that does not control *all* of the landing stations at the end of a route served by the proposed cable.[15] As the Commission recognized,[16] where there are multiple, separately controlled landing stations, users of the cable would have different paths for obtaining access to a

---

14 *See Submarine Cable Streamlining NPRM*, para. 33.

15 *Compare Submarine Cable Streamlining NPRM*, para. 30 *with* para. 33.

16 *See Submarine Cable Streamlining NPRM*, para. 30.

destination country over the proposed cable. An entity that did not control *all* of the landing stations at one end of a cable segment simply could not use its participation in the proposed cable to dominate the market for capacity along a particular route.

FLAG Telecom disagrees with Global Crossing's proposal that cable landing licenses should not be granted if the landing parties on the U.S. end of the proposed cable control more than 35 percent of the active half circuits on the U.S. side of the route served by the proposed cable.[17] This proposal could have the unintended effect of discouraging rather than promoting infrastructure investment and deployment. The Commission should not discourage the build-out of additional submarine cable capacity, especially if the landing parties in question are the only applicants proposing construction on a particular route. Other less draconian means exist for remedying any perceived competitive harms on the U.S. side of the proposed route. For example, in egregious cases the Commission could address competitive concerns – yet still encourage capacity deployment – by imposing common carrier obligations on a case-by-case basis, rather than denying outright the grant of a cable landing license. *See infra* discussion at 13-14.[18]

---

[17] *See id.*, para. 37.

[18] FLAG Telecom supports without further refinement the Commission's third option for qualifying for streamlined treatment – demonstration that sufficient pro-competitive arrangements exist with respect to the proposed cable. *See id.*, para. 38.

II. THE PROPOSED TIMETABLE FOR STREAMLINED GRANT SHOULD BE SHORTENED.

In FLAG Telecom's experience, the amount of time that lapses between the actual filing of the cable landing license application and the license grant can be crucial to the commercial viability of a proposed submarine cable project. Shorter application processing time brings a degree of regulatory certainty that facilitates financing of the cable project and "pre-sales" of capacity (i.e., commitments by customers that are willing to sign up for capacity before the cable is built). Grant of the U.S. cable landing license also places moral pressure on other regulatory bodies to grant landing rights and licenses at the foreign ends of the proposed cable segments.

FLAG Telecom therefore advocates that the Commission at least conditionally grant applications qualifying for streamlined processing on an expedited, date-certain basis.[19] When the streamlining criteria are met, the time frames and processes for evaluating (and granting) a cable landing license should be materially shorter and simpler than a comparable non-streamlined application. While FLAG Telecom recognizes that the Commission cannot control or dictate the State Department's review of a cable landing license application, the streamlining process nevertheless should be similar to the date-certain processing adopted by the Commission for streamlined 214 applications.[20]

---

19 *See Submarine Cable Streamlining NPRM*, paras. 51-54.

20 *See generally 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, Report and Order, 14 FCC Rcd 4909 (1999); *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, 11 FCC

(continued...)

The Commission has proposed to grant a streamlined application within 60 days from the date the International Bureau issues a public notice accepting the application for filing.[21] This proposed 60-day time frame is too long and appears inconsistent with other proposals in the *NPRM*. Specifically, the Commission has proposed rules that assume that underseas cable facilities become competitively obsolete within 36 months.[22] Given that presumed rate of economic deterioration, it would appear unreasonable for the Commission to adopt a so-called "streamlined" licensing time frame that is the equivalent of over five percent of the presumed economic life of a cable.

The Commission can and should shorten considerably the proposed timetable for streamlined grant of a cable landing license, similar to the 14-day streamlined 214 application process. For example, given that many routes will already have been deemed competitive pursuant to declaratory ruling or prior license applications, the Commission should take no more than one week after filing to assess whether the proposed cable (or any segments thereof) qualifies for streamlined processing. Hence, the Commission could commit to present the application, along with the Commission's recommendation that grant of the license is in the public interest, to the Department of State within three days of placing the streamlined application on public notice. The Commission likewise could commit to act on

---

20 (...continued)
Rcd 12884 (1996).

21 *See Submarine Cable Streamlining NPRM*, paras. 53-55.

22 *See id.*, para. 28.

the application (i.e., grant the license) within three days of its return from the Department of State. If, however, the Department of State failed to act on the application within two weeks, then the Commission could issue a conditional grant of the cable landing license.[23]

III. MAINTAINING THE COMMON CARRIER/PRIVATE CARRIER DISTINCTION WILL PRESERVE MUCH NEEDED FLEXIBILITY IN THIS CAPITAL-INTENSIVE INDUSTRY.

FLAG Telecom supports the Commission's intention to continue the policy of granting non-common carrier (or private carrier) status to stimulate further market competition in the provision of international transmission facilities.[24] FLAG Telecom submits that the recent explosion in cable capacity is due, at least in part, to the private submarine cable policy promulgated by the Commission in 1985.[25] Moreover in an industry that is subject to rapidly changing technology and declining prices for cable capacity, cable licensees need the flexibility to negotiate capacity packages on an individualized basis with carriers.

The Commission therefore should continue to encourage private or non-

---

23 *See Submarine Cable Streamlining NPRM*, para 55 (proposing streamlined grant of a cable landing license conditioned upon ultimate approval by the Department of State). In addition, FLAG Telecom encourages the Commission – together with the Department of State – to issue a joint policy statement or enter into some sort of memorandum of understanding published in the Federal Register that describes the legal and policy standards that both agencies will use to evaluate cable landing license applications. Because the criteria used by the Department of State to evaluate license applications are currently unpublished, memorializing and defining the standards used by the Department of State to evaluate license applications would shed light on the regulatory approval process and perhaps accelerate the coordination process.

24 *See id.*, para. 69.

25 *See Tel-Optik Ltd.*, 100 F.C.C. 2d 1033, 1046-48 (1985).

common carrier status where (1) no legal compulsion requires the carrier to serve the public indifferently and (2) the carrier is not holding itself out indifferently to the public. The imposition of common carrier regulation on all submarine cables, including nondiscrimination requirements, could act a strong disincentive to build a submarine cable in an otherwise unserved area. [26] By maintaining the common carrier/private carrier distinction, however, the Commission would retain the flexibility to impose common carrier obligations on a case-by-case basis in those rare circumstances where the proposed cable ownership raises competitive concerns.

IV. APPLICANTS FOR A CABLE LANDING LICENSE SHOULD INCLUDE ONLY LANDING PARTIES AND PARTIES HAVING *DE FACTO* CONTROL, OR 25 PERCENT OR GREATER OWNERSHIP, OF THE PROPOSED CABLE.

Regarding the Commission's request for comment on who should be included as an applicant for a cable landing license,[27] FLAG Telecom asserts that the applicant(s) for a cable landing license should include the owners of the landing stations and any person or entity having *de facto* control of the cable system on a relevant route.

FLAG Telecom, however, believes that the Commission's proposal to consider as an applicant any party holding five percent or greater ownership interest in the proposed

---

[26] In addition, when a proposed cable qualifies for a streamlined grant, the Commission should rely on market forces rather than regulations to police the routes it concludes are competitive. The standard conditions suggested by Level 3, *see Submarine Cable Streamlining NPRM*, paras. 75-76, should not apply to cables/routes that are deemed competitive.

[27] *See id.*, paras. 78-83.

cable simply goes too far. Indeed, current Commission regulations apply a 10 percent attribution standard for international common carrier applications, including cable landing license applications.[28] Similarly, under existing Commission regulations, a carrier is not deemed affiliated with a foreign carrier unless the ownership interest exceeds a 25 percent threshold.[29] Likewise, section 3(1) of the Communications Act, as amended by the Telecommunications Act of 1996, defines ownership for purposes of being an affiliate as "an equity interest (or the equivalent thereof) of more than 10 percent." 47 U.S.C. § 153(1). FLAG Telecom therefore advocates that the Commission include as an applicant any entity holding a 25 percent or greater ownership interest in, or *de facto* control of, the proposed cable. But in no event should the Commission consider as an applicant any ownership interest less than the 10 percent attribution standard currently applicable to cable landing license applications.

In addition, the Commission should clarify that, during the pendency of a cable landing license application, applicants need not report minor ownership changes unless such changes constitute a transfer of control. This approach is consistent with the Commission's overarching procedural rule that applicants promptly report changes when "the information furnished in the pending application is no longer substantially accurate and complete in all significant respects." 47 C.F.R. § 1.65.

---

28 *See* 47 C.F.R. §§ 1.767(a)(8), 63.18(h) (The regulation governing cable landing license applications requires information and certifications required in 47 C.F.R. §63.18(h)-(k), which in turn requires the reporting of "any person or entity that directly or indirectly owns at least ten percent of the equity of the applicant.").

29 *See* 47 C.F.R. § 63.09(e).

V. CONCLUSION

FLAG Telecom strongly endorses the Commission's initiative to relieve carriers of the delay and uncertainty of a cumbersome approval process. To achieve the pro-competitive objectives that the Commission has identified, the Commission should not adopt streamlining standards that are more rigorous, or criteria that are more burdensome to meet, than the showings and standards for processing non-streamlined applications. Simple and easy-to-apply criteria and date-certain processing for streamlined applications will best promote the rapid build-out of infrastructure and deployment of submarine cable capacity.

Respectfully submitted,

FLAG Telecom Holdings Limited

By: Linda G. Morrison

Stuart Rubin
M. Veronica Pastor
FLAG Telecom Holdings Limited
103 Mount Street
London
W1Y 5HE
U.K.

Jay L. Birnbaum
Linda G. Morrison
Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7288

Their Attorneys

Dated: August 21, 2000